AMERICAN CITIZENSHIP.

PART I. DEFINITIONAL.

A state justice has recently said:

"The definition of 'citizen' in the Federal Constitution being, I think, so simple and easily understood, and the opinions of the federal supreme court, of the federal state department (under international law), and of text-writers being so numerous and labored and to me confusing, I hesitate to express an opinion at this time, as to what constitutes citizenship."[1]

That the subject presents its difficulties must be admitted, but it is hoped that it is not too late to draw from our Constitution and the authoritative judicial interpretations of it, at least, consistent definitions and principles, and to dispel some of "that confusion in regard to citizenship and alienage which every public lawyer meets and dreads."[2]

Modern systems of public law recognize four concepts which it is necessary for this purpose to define briefly. These are nationality, alienage, subjection and citizenship.

Nationality is the characteristic or status of a person by virtue of which he belongs to a particular state.[3] As a synonym for *nationalität,* many German writers prefer *staatsangehörigkeit,* which accurately embodies the above definition.

The opposite of nationality is alienage,—a proposition that completely defines alienage. Re-stated, alienage is the characteristic of not belonging to the state, from the standpoint of which the person is being regarded. Alienage is a negative, nationality a positive. Thus we say clothed with American nationality, but not clothed with alienage. "American alienage" would be an inexcusable novelty. Alienage is regarded as a disability, an incapacity. Yet we speak of the status of alienage and the status of nationality, just as, in private law, we speak of the status of infancy, or of lunacy. A person who has the status of alienage is called an alien. To find a corresponding term to apply to a person who has the status of nationality has troubled writers on public law in all languages. "Subject" and "citizen" have been so much abused that neither has any longer the singleness nor definiteness of meaning that is desired

[1] Milburn, J., in Buckley *v.* McDonald (1906) 33 Mont. 483, 84 Pac. 1114.

[2] 1 Burgess, Constitutional Law and Political Science 51.

[3] It is scarcely necessary to say that the term "nationality" is used in its legal, not its ethnological, sense.

in accurate writing. In France several years ago, the word *national* came into use for this purpose, and is now general there. The more learned and clearer American and English writers have adopted it; and in spite of the objection of purists, clearness of thought and exposition demand its use.

It is permissible, therefore, to state that a person is a national of the state in which he has the status of nationality. Recurring to the definition of nationality, a national is a person who belongs to the state, nothing more nor less.

What is meant by belonging to a state is that the person who belongs, who is a national, is one upon whom the state has primary claims as against other states. The chief significance of nationality is in international relations.

The jurisdiction of the state extends in a qualified way over its nationals while they are abroad. The state may make acts done by them abroad criminal (crimes against itself) and, upon their return, may punish them. It may command its nationals to return home at a time of public emergency to serve the state, as in its armies, and their refusal to obey is just ground for punishment, should the state later lawfully get possession of their persons; and no other state may complain. The chief benefit of nationality is that the national abroad is entitled to the protection of his state.

With the alien it is different. So long as he remains outside of the territorial limits of a particular state, he is in nowise subject to the jurisdiction of that state, except in rare instances of his committing an act outside and in violation of the law of the state, which act is intended to take effect, and does take effect, within the territorial limits of that state. Piracy is an anomalous exception.

So soon as an alien crosses the territorial boundary into a state, he becomes almost wholly subject to its jurisdiction. But not wholly. It seems that he cannot be compulsively enlisted in the army of the state, at least in an international war. He may not be prevented from leaving the state, except for cause, that is, when leaving would permit him to escape or evade a duty which has lawfully been imposed upon him, or which he assumed. If he is a national of a foreign state he is entitled to its protection from arbitrary acts of the state in which he resides, if those acts are violative of international law, or treaties. The special privileges of the head of a foreign state, a foreign minister, or ambassador, and the less extensive privileges of a foreign consul, are additional exceptions.

These qualifications, though potentially of great importance, are

practically so slight, or applicable to such a limited number of persons, that it may be repeated that an alien who has entered the territorial limits of a state is almost wholly subject to its jurisdiction.

Once he has lawfully left the territory, having discharged all duties, lawfully imposed upon him or assumed by him, he entirely ceases to be subject to the state.

With these fundamental notions, which cannot be treated in detail here, the concepts of nationality and alienage stand out clearly and distinctly.

As to any particular state it may be said that every person in the world is either a national or an alien.

Now, it may be asked, what law determines this distribution or division of all persons in the world among the several states? What law determines which persons belong to this state and to that? Being an international matter it would seem that international law itself should furnish the rule of division. But it does not do so. International law has here a complete hiatus. The only rule that it lays down is, that each state may determine for itself what persons it will regard as nationals. In short, it lays down a rule of confusion, and confusion exists. As a result we have cases of double nationality. By French law a person born in the United States of French parents may be a French national; by the American law he is an American national, etc. In instances now rare, a person may have no nationality at all, a *heimatlos* as European writers term him.

International law, whether public or private, does not even offer a recognized rule for resolving these conflicts of laws, though the doctrine of election at majority promises to grow into a rule of law.

This confusion is not at all inherent in the concept of nationality, or in the status itself, but resides wholly in the rule of division,—in the determination of what persons have the nationalities of the several states. That is, while international law has defined the rights of a national, it has provided no rules for determining who are nationals of the various states. Of course, since in the crude condition of international law, each state legislates for itself in this matter, it should be perfectly feasible to declare accurately who, by the laws of a given state, are nationals of that state.

Now a word as to the concept,—"subjection." In English law a national was and is called a "subject." So too an alien, while within the territorial limits, was regarded as a "temporary"

subject, as owing a temporary allegiance.[4] It is apparent that "subject" has a double sense. As applied to the alien within the state it means one who is subject to the state, not a subject of the state. Subjection is a tantamount derivative from subject, in the sense of subject to the state, but not from subject as a synonym for national. The confused use of the word subject is so obvious that it must either be discarded altogether, or it must be confined to the idea of one subject to the jurisdiction, one in a condition of subjection to the state. Of course, there will be degrees of subjection. The alien within the state is almost wholly subject,—the alien without is almost wholly not subject. So far the word subject has been discussed on its merits, and it appears that its use in our law to designate the concept "national" will only perpetuate confused thought.

In fact it is rarely so used. In the seventeenth and eighteenth centuries, in monarchical states, it became so intimately associated with the idea of subjects of a monarch that the American revolutionists and the democratic revolutionists in continental Europe at the close of the eighteenth century, regarded it as an odious term, resorting to "citizen," "member," and even "inhabitant" to avoid its use. An American national to-day has no objection to being called a subject of the American national democratic state,[5] but this affords no reason for retaining or reviving the word as an equivalent for national. Subject and subjection, without this, have their appropriate and distinct meaning.

Finally, we have the concept "citizenship." The modern public law of England recognizes no such distinct concept. All persons, by that law are either subjects (nationals) or aliens. There is no class of nationals so specialized, or so privileged, as to require the recognition of this additional status.

In Roman law the *civitas* as a distinct status of persons was recognized. Through the one thousand years of Roman history the complex of special privileges enjoyed by a person by virtue of his citizen status varied. These were not confined to political privileges. Details are not in place here. It is sufficient that,

[4] See Carlisle *v.* United States (1872) 16 Wall. 147.

[5] "The plain men who formed the constitution of New Jersey were not carried away by such refinements. They supposed (perhaps weakly) that allegiance might be due *to the people* as well as *to the king*, and that even *a republican* might be called, without offense, *a subject*, provided his master was *the law*." Rawle, Counsel, in McIlvaine *v.* Coxe's Lessee (1804) 2 Cranch 280, 318.

perhaps at all times, there were persons who belonged to the Roman state, but were not citizens.[6]

In the middle ages the term "citizen" designated a burgess (German, *bürger*), one who was an especially privileged inhabitant of a city,—mainly the possessor of political privileges. In the French Constitution of 1799 a portion of the nationals were set apart and designated "citizens." These alone were made eligible to vote and hold office. It is believed that they differed from other nationals in no other respect. The Constitution itself answered the question who are "citizens."

The Civil Code (1804) accepted this distinction. It referred to the fact that a French national could be a citizen only by fulfilling the qualifications of the Constitution of 1799, then still in force; that the enjoyment of civil rights was independent of citizenship; that every French national should enjoy civil rights, and set forth comprehensive rules to determine who were French nationals. Under that system, as under every other, the fundamental, the primary relationship is that of nationality. The foundation of the state, the state itself, is the body of nationals. These were represented in the electoral capacity by the citizen class. The name "citizen" could have been dispensed with. "Electors" and "eligibles to office" would have supplied adequate terminology. Citizenship under that system was defined as a specially privileged political status, as the possession of the two designated political privileges.

In short, there is no universal definition of citizenship when citizenship ceases to be synonymous with nationality. While nationality is an inherent necessity, a matter of international significance and defined by international law; citizenship, if it is confined to less than the whole body of nationals, if it is a specially privileged status conferred upon some nationals and denied to others, is purely an internal affair, variantly defined by the various legislations that recognize it. Moreover, the concept may be entirely dispensed with and ignored in a liberal system of legislation, without loss.

In fact, three positions may be taken in any system of law: (1) to ignore and avoid the use of "citizen" and "citizenship;" (2) to recognize "citizens" as an especially privileged class of nationals, in which case the terms must be defined by the system

[6] Mommsen's very full treatment of the whole subject in his *Römische Staatsrecht* is especially enlightening and written with a rare understanding of modern problems of nationality.

of law recognizing them; or (3) the legislation of a state may prefer the words citizen and citizenship though using them as exact equivalents of national and nationality. In that case it would be immaterial that the national was also called citizen at home, except that by ancient usage, the usage of the Middle Ages and in modern France, the term citizen has received a restricted sense, with which the word citizen (as the equivalent of national) is, and may be, confused.

Is the citizenship spoken of in the Constitution of the United States a status distinct from and differing from American nationality? To the present writer it seems that it is not. Does American law regard "citizens" as a specially privileged class of nationals? To the present writer it seems that it does not. While it will be later conceded that there are classes of American nationals who do not have as great constitutional rights as another class of American nationals, it will not be conceded that the word "citizen" in our constitution means anything more than "national."

That the framers of our Constitution must have used "citizen" as the exact equivalent of the modern word "national" is abundantly proved by contemporary public and official usage. It must be remembered that in English law the expression "subject of the king" had this identical connotation and that the word "citizen" was used nowhere outside of America from 1776 to 1787 in legal language, in the sense either of "national" or of a specially privileged class of nationals. Our Constitution was already framed when the French first used it in the latter sense in the legislation referred to above. Consequently, the definition of the new word "citizen," as then used, is to be looked for solely in American usage.

When the thirteen American colonies assumed their "separate and independent station," it became necessary to decide who were nationals of Massachusetts, of New York, etc. Who were members of these new nations? The first state constitutions give confused answers. It is their terminology that we are mostly concerned with. Some of them called their nationals "subjects," some "inhabitants," some indifferently both "citizens" and "subjects." It is impossible to run through these constitutions noting the interchangeableness of "subject" and "citizen" without concluding that in the thought of that era, they were equivalent. Hence we must conclude that "citizen" meant merely "national," for that was the sole meaning of "subject," in this relation. In the constitutions

framed between 1789 and 1820 the term "citizen" completely supplanted "subject." A study of these constitutions in detail is thoroughly convincing, though to save space they are set out in the foot note.[7]

[7]The term "subject" is sparsely used in all the state constitutions from 1776 to 1787 save those of Massachusetts and New Hampshire; and both "subject" and "citizen" are entirely omitted from a few. Thayer's note, Cases on Constitutional Law, Vol. I, p. 460, that "the word 'citizen' is not found in any of the state constitutions before that of Massachusetts (1780)," is erroneous. It is found in at least three prior constitutions, those of Pennsylvania (1776), North Carolina (1776), and Vermont (1777).

In none of the constitutions is the term "subject" or "citizen" expressly defined; nor, secondly, are there any express rules laid down to determine what persons are aliens, on the one hand, or subjects or citizens, on the other. It is impossible to silence the suggestions that there is an attempt in most to avoid the word "subject" and that the framers of them were not yet sufficiently familiar with the euphemistic substitute, "citizen," to use it freely. In the very constitutions in which "citizen" is most often used there is the clearest evidence that it is used as an exact equivalent of "subject."

The constitution of Pennsylvania (1776) comes nearest to rules of exclusion and inclusion. With this we are not so much concerned as with the equivalence *vel non* of "subject" and "citizen," yet the context illustrates the terminology of the period.

Preamble:

"Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights," etc., etc.

Declaration of rights:

"Art. II. * * * Nor can any man, who acknowledges the being of God, be justly deprived * * * of any civil right as a *citizen*, on account of his religious sentiments * * * ."

"Art. III. That the people of this State have the sole, exclusive and inherent right of governing * * * ."

"Art. VII. That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office."

"Art. VIII. That every member of society hath a right to be protected * * * ."

The Plan or Frame of Government then creates "an assembly of the representatives of the freemen" of the State, and "every freeman," aged twenty-one, who had resided in the State one year and had paid taxes was qualified as an elector.

Every officer was required to swear to "be true and faithful to the Commonwealth of Pennsylvania." Art. 42 provides:

"Every foreigner of good character who comes to settle in this State, having first taken an oath * * * of allegiance to the same, may purchase * * * real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this State * * * ."

Thus, in the preamble, the word citizen occurs once, and subject and free denizen each occur here once, and none of the three terms are used elsewhere in the constitution. The word "citizen" is freely used in the Pennsylvania constitution of 1790.

The constitution of Vermont of 1777 is largely a copy of that of Pennsylvania and incorporates all of the clauses quoted above.

In the constitution of Georgia of 1777, the word "citizen" is not used. "Residence" is the only qualification for office. The elective franchise is given to "all male white inhabitants," and every elector must

While not more conclusive, the treaties of this period afford more striking illustrations.

take the following oath: "I, A. B., do swear * * * that I do owe true allegiance to this State * * * ." This suggests that "inhabitant" was used in lieu of "subject." Twelve years later, in the constitution of 1789, we find the word "citizen" freely used.

The only relevant passage in the constitution of Connecticut of 1776 is paragraph 3:

"That all the free inhabitants of this or any other of the United States of America, and foreigners in amity with this State, shall enjoy the same justice and law within the State * * * ." Here the opposition between "inhabitants" and "foreigners" suggests that the former was used in the sense of "subjects" or nationals.

The New York constitution of 1777 does not contain the word "citizen," except so far as the preamble sets out in full the Declaration of Independence in which occurs the expression "fellow-citizens," in a vague sense. The constitution itself (Art. I) speaks of the "people or members of this State," and Art. XIII provides that "no *member* of *this State* shall be disfranchised, or deprived of the rights or privileges secured to the *subjects* of this State by this constitution unless by the law of the land, or by the judgment of his peers." Art. VII provides that "every male *inhabitant* of full age" may vote if he has the further qualifications of property and residence, but (Art. VIII) that "every elector," if required by the election officials, must "take an oath" of "allegiance to the State." The first amendment to this constitution, adopted in 1801, speaks of the "citizens of this State" in its opening sentence.

In the constitution of North Carolina of 1776, the word "freeman" is used consistently throughout, where such a word as "subject" or "citizen" might be expected, except in Article XL, which is modelled upon Art. 42 (quoted above) of the constitution of Pennsylvania, with a significant change of the word "denizen" to "citizen." Thus:

"Art. XL. That every foreigner, who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or, by other just means, acquire, hold and transfer land, or other real estate; and after one year's residence, shall be deemed a free *citizen*."

The Massachusetts constitution (1780) and the second constitution of New Hampshire (1784) are the most instructive. The relevant passages of the former are here set forth. The changes from the word "subject" to "citizen" in these passages where the context presents no ground for difference are explainable only on the theory of their absolute equivalence.

Massachusets constitution of 1780:

"Art. IV. The people of this commonwealth have the sole and exclusive right of governing themselves * * * ."

"Art. IX. * * * all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers * * * ."

"Art. X. Each individual of the society has a right to be protected [in life, liberty and property]."

"Art. XI. Every *subject* of the commonwealth ought to find a certain remedy * * * for all * * * wrongs * * * ."

"Art. XII. No *subject* shall be held to answer for any crimes," etc.

"Art. XIII. In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the *citizen*."

"Art. XIV. Every *subject* has a right to be secure from all unreasonable searches * * * ."

"Art. XXV. No *subject* ought, in any case, * * * to be declared guilty of treason or felony by the legislature."

"Art. XXIX. * * * It is the right of every *citizen* to be tried by [free and impartial judges]." "It is, therefore, * * * for the

The first American treaty, that of amity and commerce with France, in 1778 uses the expression "subjects of the United States" frequently, while in other passages, calling for no difference, "citizens of the United States" appears. For example:

"Art. I. There shall be a firm, inviolable and universal peace * * * between * * * the subjects of the Most Christian King and of the said States * * *.

"Art. X. The United States, their citizens and inhabitants, shall never disturb the subjects of the Most Christian King [in the Newfoundland fisheries]."

The treaty of alliance of 1778 refers in its preamble to the treaty of amity and commerce as "for the reciprocal advantage of their subjects and citizens."

The convention of 1778, Art. XIV, reads:

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security of the rights of the people, and of every *citizen* [that judges hold during good behaviour]."

In the first amendment, 1822, the word "citizen" is used familiarly. Art. III. "Every male citizen of twenty-one years and upwards (except paupers and persons under guardianship)," may vote if they satisfy other requirements.

The brief New Hampshire constitution of 1776 does not contain the term "citizen." The pertinent passages of the constitution of 1784 are as follows:

Bill of Rights:

"Art. V. * * * no *subject* shall be hurt [or] molested—for worshipping God [in the manner approved by his conscience]."

"Art. VI. * * * and every denomination of Christians demeaning themselves quietly, and as good *subjects* of the State, shall be equally under the protection of the law * * * ."

"Art. XI. All elections ought to be free, and every *inhabitant* of the State having the proper qualifications has equal right to elect, and to be elected into office."

"Art. XII. Every member of the community has a right to be protected * * * in * * * life, liberty and property."

"Art. XIV. Every *subject* of this State is entitled [to judicial remedies for wrongs]."

"Art. XV. No *subject* shall be held to answer for any crime," etc.

"Art. XVI. No *subject* shall be liable [to double or second jeopardy]."

Then the terminology shifts to citizen and back to subject, and back again to citizen, with no reason in the context for a difference.

"Art. XVII. In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the *citizen*, that no crime or offence ought to be tried in any other county * * * ."

"Art. XIX. Every *subject* hath a right to be secure from all unreasonable searches * * * ."

"Art. XXXV. * * * It is the right of every *citizen* to be tried by judges as impartial as the lot of humanity will admit."

Part II—The Form of Government—says, "The people inhabiting the territory formerly called the Province of New Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent Body-politic, or State, by the name of the State of New Hampshire."

Except for the substitution of the word "person" for "subject" in Art. V *supra*, the constitution of 1792 contained the passages just quoted, without change.

"The subjects of the Most Christian King, and the citizens of the United States, who shall prove by legal evidence 'that they are of the said nations respectively * * *."

This opposition of citizen and subject, this antithesis between subject of a king and citizen of a republic is found in the treaty of peace with Great Britain, 1782-1783, and the treaty of commerce with Prussia of 1785.

"There shall be a firm and perpetual peace between His Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other * * *."

"There shall be a firm peace * * * between His Majesty, the King of Prussia, his heirs, successors, and subjects, on the one part, and the United States of America and their citizens on the other * * *."

One term is appropriate to a monarchy, the other to a republic, but beyond this, subject and citizen have the same meaning. They embrace all nationals. If the negotiators or ratifiers suspected that there was or might be a class of Americans who were subjects but not citizens the more general term would have been used in settling our international relations. It would be most strange to declare a peace between the subjects of these monarchs on the one hand and the citizens of the United States, on the other, said peace not to extend, however, to the mere subjects of the United States. Equally would it be unexpected that commercial privileges should be secured only to a privileged class of Americans, though without distinction to all classes of Englishmen, Frenchmen and Prussians.

The direct evidence from the language of the constitutions and treaties is supported by the inferences necessarily drawn from the absence from the Constitution of the United States of any definition of "citizen" and of any rules defining who were to be "citizens." If we assume that citizen meant some specially privileged class of nationals, we put the framers in the position of creating a new status unknown to any system of law then existing, without being able to assign any plausible reason for their silence as to its definition, and the persons possessing it.

On the contrary assumption, a reasonable explanation is forthcoming. If "citizen" designated the concept national, or subject as then used in English and Continental law, it was self-definitory. But it will be said that the definition of the status does not account for the absence of rules for determining who should possess it.

Prior to the French Revolution the rule was almost universal in Europe, both in England and on the continent, that birth on the soil of a state made the person so born a subject (national) of that state. This was sometimes referred to as the common law of Europe. Sometimes it was referred to as a rule of public law. This rule of birth on the soil, the *jus soli,* was first seriously departed from in modern times in the Civil Code of France in 1804, which made the *jus sanguinis* the almost exclusive rule as to nationality at birth.[8]

That is, the French legislators enacted that a child born of French parents, wherever born, was a French national and gave no effect to mere birth on the soil. Many of the states of Europe followed this example. Modern writers on international law state that international law has no rule whatever on the subject, that each state may legislate for itself and lay down its own rules, whether the *jus soli,* the *jus sanguinis,* a composite system, or any other system. It seems that the publicists are right in asserting that there never has been any rule of international law on the subject.[9] But even so, the framers may have thought that such a rule existed. The absence of an international rule has been clearly stated only in recent times. Expressions are not wanting in our early judicial utterances indicating a belief in the existence of such a rule. Even so late as 1854, Mr. Justice Curtis in the case of *Dred Scott* v. *Sandford,*[10] declared:

"Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself,[11] that birth on the soil of a country both creates the duties and confers the rights of citizenship."

The only alternative to this explanation, *viz.,* that the framers believed in the existence of public (international) law rules that determined who were citizens, is that they believed that an enlight-

[8]The writer of course does not overlook the earlier English statutes by which the *jus sanguinis* was to a certain extent superadded to the *jus soli.*

[9]"Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what class of persons shall be entitled to its citizenship." Gray, J., delivering the opinion of the court in United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 668.

[10](1856) 19 How. 393, 578.

[11]It is impossible to find any word or phrase to which Mr. Justice Curtis could have attributed this effect other than the bare use of the term "citizen." See further on the supposed existence of a rule of "public law," Story, J., delivering the opinion of the court in Shanks *v.* Dupont (1830) 3 Pet. 242 and Appleton, J., in Opinions of the Justices (1857) 44 Me. 505, 546.

ened posterity would know that they had merely substituted the word citizen for the odious term subject, not only with the meaning of subject under the English law but carrying with it the common law rules for the acquisition of the status. There is not wanting strong judicial authority that the use of the term citizen (subject) incorporated into the Constitution that rule of English law that every person born within the territory is a citizen (subject).[12]

To be sure, this view was usually held as to the question whether there was any national law creating persons citizens at birth, prior to the Fourteenth Amendment, or whether persons could become citizens at birth, solely by virtue of state laws. It seems the sounder view, that even before the Fourteenth Amendment no state could create citizens of the United States at birth any more than by naturalization.

Doubtless it has never before been suggested that this has any bearing upon the point that citizen = subject = national, though that is its logical trend. British subject has no meaning beyond British national. The two are absolutely synonymous.

No mention has thus far been made of the remarkable phrase in Art. III of the Constitution. The judiciary clause, in giving a right to resort to Federal courts to certain types of parties, extends the judicial power of the United States to cases "between a State, or the citizens thereof, and foreign States, citizens or subjects." Looking at this phrase apart from the established usage in the language of the era in which the Constitution was framed it would be impossible to say whether "citizens or subjects" sets the two words in opposition to each other, as not co-extensive with each other,—or sets them in apposition as equivalents. In the light of contemporary usage, nothing more seems intended than the distinction made in the treaties, that one term is appropriate to the nationals of a republic, the other to the nationals of a monarchical state.

Concluding this phase of the discussion, the inference to be

[12]This view is taken and discussed at length by Gray, J., delivering the opinion of the court, in United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 654; and embraced to its fullest extent in a very enlightened opinion in Lynch *v.* Clarke (N. Y. 1844) 1 Sandf. Ch. 583. "The term 'citizen,' as understood in our law, is precisely analogous to the term *subject* in the common law; and the change of phrase has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people—and he who before was 'a subject of the king' is now a citizen of the State." State *v.* Manuel (N. C. 1838) 4 Dev. & B. 20, 26.

drawn from the absence from the Constitution of any rules for determining who are citizens is that citizen is the equivalent of national. For if the framers thought that the term was defined by public law, they must have meant either the law of England or public international law. The latter might determine who are nationals, an international affair, but certainly could not determine what persons in a state should have a peculiarly privileged status as against other members of the state; and if they thought it defined in the sense of subject as used in English law, the source of so many of our legal institutions and definitions, the result is the same.

It has been supposed that the views of some of the judges in *Dred Scott* v. *Sandford*[13] is at war with these conclusions and that they recognized the existence of a class of subjects or nationals who were not citizens. The question raised by the plea in abatement in that case was whether a free negro born in the United States, whose ancestors had been imported into this country and sold as slaves, could sue in a Circuit Court of the United States under the diversity of citizenship clause. A majority of the court held that the plea in abatement was not before the court. In his personal opinion, however, Chief Justice Taney declared that such free negroes were not citizens of a State within the meaning of this clause. And further, since he thought, and rightly, it seems, that every person was a citizen of a State who, being a citizen of the United States, resided there,[14] he declared that free negroes were not citizens of the United States. The Chief Justice was led to this view not so much by a supposed intention of the diversity of citizenship clause as by the belief that free negroes were not intended to have the privileges and immunities of Art. IV, Sec. 2, which were also in terms given to "the citizens of each State:"

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Chief Justice said:

"More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special

[13] (1856) 19 How. 393.

[14] It had been so held by the Supreme Court in 1832, Marshall, C. J., delivering the opinion. Gassies *v.* Ballon (1832) 6 Pet. 761.

laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

"It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them."[15]

This was the controlling clause as appears in other portions of the opinion. Taney rightly said, that Art. IV, Sec. 2, "gave to each citizen rights and privileges outside of his State * * * and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property."[16] Was it the intention of the framers, he asks, to clothe the free negroes "with all the privileges of a citizen in every other State?"[17]

"It is obvious that they [the free negroes] were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union."[18]

Referring to the abolition of slavery in Connecticut and the Connecticut law of 1788, prohibiting her citizens from engaging in the slave trade, he said, that there was in that legislation, "certainly nothing which would have led the slaveholding States to suppose, that Connecticut designed to claim for them [the negroes], under the new Constitution, the equal rights and privileges and rank of citizens in every other State."[19]

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[15] *Supra*, 416-417.
[16] *Supra*, 406-407.
[17] *Supra*, 406.
[18] *Supra*, 411-412.
[19] *Supra*, 413-414.

Thus while the decision would have been, had Taney succeeded in influencing a majority of the court, that no free negro "whose ancestors were imported into this country and sold as slaves" was a citizen of the United States, nor a citizen of a State under the diversity of citizenship clause, his main argument was that the framers could not have intended free negroes to be citizens of a State under Art. IV, Sec. 2.

Only two justices concurred with Taney's view that no such negro was a citizen of the United States.

Mr. Justice Curtis, dissenting from the judgment in the case, only dissented from this view in a qualified way. He declared that the position of the Chief Justice could not be affirmed of *all* free negroes with such ancestry, but that since, in his opinion, the States might then create such persons as they saw fit state citizens, and *ipso facto* citizens of the United States, some free negroes might have been made citizens, and actually had been, by some States; leaving the inference that *some* free negroes were not "citizens" within the clause in question.

The net result and the entire result of the case so far as the question in hand is concerned is that four out of nine justices believed that some negroes born in the United States whose ancestors had been born on our soil through several generations, were not entitled to the privileges of the diversity of citizenship clause or to the privileges and immunities of Art. IV, Sec. 2.

It was not necessary to Taney's view to say that the free negroes were not *aliens,* nor does any known case so decide, but there has been a consensus of opinion that they were not. So Taney, while he stated that, in his opinion, the tribal American Indians were aliens[20] said: "The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free."[21]

If not aliens, what were they? It has been answered as to the native inhabitants of our "insular possessions" that they are nationals—not citizens.[22] But how can there be non-citizen nationals when the Constitution uses the term citizen as synonymous with national? Under the Constitution there are but two alternatives, citizenship or alienage. There is nothing in the opinion expressed by the justices in the case under discussion inconsistent with the

[20] *Supra,* 404, 420.

[21] *Supra,* 420.

[22] Frederic R. Coudert, Jr., "Our New Peoples: Citizens, Subjects, Nationals or Aliens," 3 COLUMBIA LAW REVIEW 13.

view that the free negroes were citizens but without some of the rights which the Constitution especially conferred upon citizens. So far as the judges used the expression that they were not citizens, was this not a mere *usus loquendi?* Their quasi-decision should be confined to the points actually involved, *viz.,* that the persons in question were not entitled to the privileges of certain clauses. Is it not a permissible view that though citizens, they did not have, because they were never intended to have, the benefit of these clauses? This is consistent with Taney's principal argument that the whole tenor of our constitutional history and the treatment of this people in our legislation, state and national, showed that they were not included nor intended to be included within the body of citizens-with-full-rights.

The Constitution did not create the status of citizenship by conferring upon citizens certain constitutional rights. It regarded that status as a well-known, and previously defined status. It assumed that rules existed by which the class of persons who were citizens was determined. Making use of the term "citizen" it proceeded to confer two special privileges, Art. III, Sec. 2 and Art. IV, Sec. 2, and to impose two disabilities on non-citizens, *i. e.,* ineligibility to the House and Senate. It was not supposed that the status had its origin from these provisions,—or that the status of citizenship should be defined as the possession of these two rights, or the lack of these two disabilities. Consequently since no person or class of persons can enjoy the status of citizenship without the consent of the nation, or those organs authorized to give consent, that consent may be given with qualifications. If the nation saw fit to incorporate the free negro into our citizenship without the full privileges of other citizens no one could complain.

The Constitution itself creates other distinctions between citizens. A naturalized citizen is not eligible to the offices of President or Vice-President. The Fourteenth Amendment extends a qualified guaranty to the electoral franchise of male citizens which it does not extend to female citizens.[23]

"The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities and according to circumstances. Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed

[23]Of course neither is granted a right to vote but a penalty is prescribed against a State that denies the right to male citizens twenty one years of age, but not if it denies it to female citizens.

with any other rights, civil or political. Women, minors, and persons non compos are citizens, and not the less so on account of their disabilities."[24]

The *solemniter dictum* of the judges in the *Dred Scott* case would not be entitled to so much consideration if the view could be now accepted that was once so widely entertained in some quarters, that Mr. Justice Curtis' attempted refutation of Taney's opinion was successful. This view was chiefly entertained as to the holding in the second branch of Taney's opinion that the Missouri Compromise Act was unconstitutional. It was this portion of the opinion that so much disturbed the minds of contemporaries. It was entirely unrelated to the question of citizenship. Though both Chief Justice Taney and Mr. Justice Curtis thought and rightly, as is now conceded, that the whole record was open on the question of jurisdiction and that the plea in abatement was before the court, five other justices held that it was not.[25] The court was thus forced to consider the case on its merits, and the question then was, was Dred Scott a slave? The second branch of Taney's opinion was addressed to this problem, and since five of the justices concurred with him, this portion of his opinion may with some justification be called the opinion of the court. These justices held that Scott was a slave, and in reaching this conclusion they thought it necessary to consider the constitutionality of the Compromise Act. Mr. Justice Nelson concurred in the result without finding it necessary to pass upon that Act. Justices McLean and Curtis dissented from both portions of Taney's opinion. Whether Curtis refuted that portion which dealt with the Missouri Compromise Act is immaterial here. On the question of citizenship he rested his argument on a premise which cannot now be admitted, *viz.*, that each of the several States had the exclusive right to determine who should become its citizens *by* or *at birth,* and that a person who thus became a citizen of a State was *ipso facto* a citizen of the United States. Moreover, the argument was purely opportunist. It merely sufficed to show that the allegations in the plea in abatement were not sufficient and that the demurrer should have been sustained. It went no further than that in some States free negroes were citizens. The rules of law which he laid down made it certain that the greater part of our free negro population were not citizens under the clauses dis-

[24] United States *v.* Rhodes (1866) Abb. U. S. 28, Fed. Cas. No. 16,151; and see Minor *v.* Happersett (1874) 21 Wall. 162.

[25] 1 Thayer, Cases on Constitutional Law 493 n.

cussed. Though the Supreme Court of North Carolina had held in 1836 that a negro born in that State was, if free, entitled to all the privileges of a citizen,[26] a subsequent amendment to the Constitution of that State had taken away these privileges, if, as Curtis contended, state legislation controlled. And in other States it had been held that free negroes were not entitled to the privileges of citizens,[27] and these decisions settled the matter in those States if state law controlled.

Under the view herein submitted, that the free negroes before the war were citizens of the United States, but with qualified rights, *i. e.*, without the privileges of Art. III, Sec. 2, and especially of Art. IV, Sec. 2, the state legislation discriminating between different classes of citizens was not unconstitutional, for there was then wanting in our Constitution any prohibition that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law; or deny to any person the equal protection of the laws. Apart from Art. IV, Sec. 2, the Constitution did not require equal treatment of American nationals.

Though a few of the States may have regarded the negroes as citizens before the adoption of the Constitution, yet to the mind of a follower of Marshall, whose views Taney expounded in the main, it seems impossible to concede that the power Curtis contended for was reserved to the States; it seems impossible to admit that the framers intended to incorporate the free negroes into the people who were to enjoy the privileges of Art. IV, Sec. 2; it seems impossible that the Constitution could have been adopted with that understanding.

The doctrine of Chief Justice Taney might have been denominated the doctrine of unincorporated peoples; but it seems better to limit his language to the object in view and to say that the free negroes were citizens, though without full rights. They were

[26]State *v.* Manuel (N. C. 1838) 4 Dev. & B. 26.

[27]Amy *v.* Smith (Ky. 1822) 1 Litt. 326; State *v.* Claiborne (Tenn. 1838) Meigs 331; Pendleton *v.* State (1844) 6 Ark. 509; Cooper *et al. v.* Mayor (1848) 4 Ga. 68; Bryan *v.* Walton (1853) 14 Ga. 185; and see Crandall *v.* State (1834) 10 Conn. 339; Donovan *v.* Pitcher (1875) 53 Ala. 411; Mitchell *v.* Nancy Wells (1859) 37 Miss. 235. In State *v.* Claiborne *supra*, the court said:

"By whatever appellation we may designate free negroes, whether as perpetual inhabitants, or citizens of an inferior grade, we feel satisfied, that they are not citizens in the sense of the Constitution," *i. e.* in the sense of Art. IV, Sec. 2.

citizens in every respect internationally and constitutionally but not clothed with those special privileges which the nation did not intend to confer upon them. Thus the status of this anomalous class of persons may be accounted for without a departure from the established meaning of "citizen" as used in the Constitution. All American nationals are citizens, though a class of citizens once existed with less than full rights.

Reverting for the moment to the international aspects of nationality, the question may be asked whether in diplomatic relations the United States may extend protection abroad to persons who are not citizens, and the answer necessarily must be, if the identity of nationality and citizenship, in our law, is accepted, that she may not, if protection may be extended to nationals only. In rare instances, however, a quasi-nationality may be admitted by international law to be a sufficient ground. The practice in Turkey of regarding a consulate as the rightful local protector of any alien registered therein, whether he owed allegiance to the country in whose consulate he had registered or not, might clothe an alien with temporary and local rights of protection, at least as against other states having no superior claim, as was asserted by Secretary Marcy in Kostza's case. Since Kostza was an alien, not naturalized in the United States, he did not, however, possess American nationality in any correct sense. So far as Secretary Marcy based Kostza's alleged "national character" upon his domicil in the United States he was applying rules applicable to the entirely different matter of the quasi-nationality recognized in prize law as resulting from so-called belligerent domicil.[28]

So too the temporary national character with which a seaman is clothed by virtue of and during his service[29] may be called quasi-nationality, since it exists independently of the true nationality of the seaman.

Since Professor J. B. Moore regards American citizenship as only one of the sources, though the great one, of American national character,[30] meaning thereby American nationality, it is evident that the definition of nationality entertained by that learned author differs from the present writer's, and is probably flexible

[28] See the very accurate statement of Kostza's case in J. B. Moore's American Diplomacy and the documents collected in 3 Moore's Digest of International Law 820. See the careful statement of the limited and temporary character of the quasi-nationality resulting from belligerent domicil in 3 *ibid.* 810 *et seq.*

[29] See 3 Moore's Digest of International Law, 795.

[30] 3 Digest of International Law, 273.

enough to embrace the instances of quasi-nationality, just referred to, as well as what has here been characterized as true nationality. It is believed, however, that the recognition of a distinction between true and quasi-nationality gives a terminology in accurate accord with existing rules of law.

Let us turn now to the status of the American tribal Indian and the status of the native inhabitants of our insular possessions.

(To be concluded.)

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